

Claimant requests review and argues that the uncontradicted medical evidence established that he suffered permanent impairment and the only dispute was whether his impairment was limited to his shoulder or included his chest. Consequently, claimant argues the more persuasive medical evidence establishes that he suffered a whole person permanent partial functional impairment.

Respondent argues the ALJ's Award should be affirmed. Respondent argues claimant failed to cooperate with medical treatment and should be denied compensation. In the alternative, respondent argues if the claim is compensable then claimant is only entitled to a 3 percent scheduled disability to the right shoulder.

The sole issue for Board determination is the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent on June 14, 2004. His job required that he repetitively use knives and an air saw to cut cow carcasses. On approximately November 17, 2004, claimant experienced an onset of pain in his chest and right shoulder. He received treatment at the plant nurse's station which consisted of ice packs and pain medication. Claimant testified that he returned to the nurse's station with pain complaints about every two days but the treatment he received never changed.

Claimant's employment with respondent was terminated in mid-February 2005. On March 24, 2005, claimant filed an E-1 Application for Hearing alleging he suffered accidental injury to his right shoulder and chest on November 25, 2004.

Susan Williams, respondent's nursing director, testified that claimant was scheduled for an appointment on May 16, 2005, with Dr. Ian Yeats, respondent's treating physician, but claimant did not keep the appointment. So, a second appointment was scheduled on June 2, 2005, and claimant failed to keep this appointment as well. It was noted that Dr. Yeats does not perform independent medical examinations or give ratings.

Claimant agreed that he did not keep the appointment on May 16, 2005. He did not offer any explanation for missing that appointment. Because claimant was in the process of relocating to California he did not receive notice from his attorney that a second medical appointment with Dr. Yeats had been scheduled.

After claimant missed the second scheduled appointment with Dr. Yeats, the respondent's attorney's legal assistant, Nicole Burkey, contacted claimant's attorney's office and spoke with a woman named Erica. Ms. Burkey was told that claimant no longer wanted medical treatment and instead wanted to settle his claim. It was suggested that an appointment be scheduled for obtaining a rating. Consequently, an appointment was scheduled for claimant to see Dr. Pedro Murati on July 7, 2005.

Dr. Pedro A. Murati examined claimant on July 7, 2005, at the request of respondent's attorney. Dr. Murati took a medical history from claimant and performed a physical examination. Claimant complained of bilateral mid sternum and right shoulder pain. The doctor diagnosed claimant with right rotator cuff strain, left sternochondritis and myofascial pain syndrome of the right shoulder. Based upon the *AMA Guides*¹, the doctor concluded claimant had a 3 percent right shoulder impairment due to acromial clavicular crepitus. Dr. Murati further noted that the only restrictions he would place on claimant were to work as tolerated and to use common sense.

At the request of claimant's attorney, Dr. Michael H. Munhall, board certified in physical medicine and rehabilitation, examined and evaluated the claimant on October 20, 2005. Dr. Munhall took a history from claimant and performed a physical examination. The physical examination revealed bilateral, multi-level sternocostal joint palpation tenderness, and tenderness to the right pectoralis. Claimant's complaints were right shoulder pain and intermittent burning or popping through his ribs adjacent to the sternum through the mid-chest. Dr. Munhall diagnosed the claimant with right acromioclavicular joint pain and myofascial pain involving the right upper quadrant as well as sternochondral pain bilaterally. The doctor recommended an orthopedic evaluation, physical therapy, medication, injection management, x-rays, imaging studies and temporary modified duty work. Dr. Munhall opined that claimant had suffered two discreet injuries, one to the chest and one to the shoulder and that he was not at maximum medical improvement.

In the event claimant received no further treatment, Dr. Munhall rated claimant with a 6 percent whole person functional impairment. Dr. Munhall rated claimant's sternocostal pain at 3 percent whole person and rated claimant's right shoulder at 5 percent.

On cross-examination, Dr. Munhall noted that he had not been told about claimant's work history after he left his employment with respondent and that claimant's work at the car wash could have aggravated his condition. And Dr. Munhall agreed that there was no rating for sternocostal pain in the *AMA Guides*.

After relocating to California the claimant obtained employment at a car wash where he used a pressurized gun to wash cars. Although he did not receive any medical treatment while in California, the claimant testified that he continued to take over-the-counter pain medication. Claimant returned to Dodge City, Kansas in mid-June 2006 and got a job repairing houses which included laying floors, hanging sheetrock and painting until he was fired in April 2008.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

compensation and to prove the various conditions on which his right depends.² The existence, nature and extent of the disability of an injured workman is a question of fact.³

In this instance, the claimant obtained employment after he was terminated from his job with respondent. Claimant neither sought nor presented any evidence to establish that he suffered a work disability. Consequently, the sole issue is the extent of claimant's functional impairment, if any.

Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁴ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.⁵

The claimant suffered injury, reported it and received treatment at the nurse's station in the plant. Claimant's employment was terminated and he then apparently sought medical treatment from respondent. After he missed his first scheduled appointment he relocated to California and was unaware a second appointment had been scheduled. As a result claimant never received additional medical treatment and instead was provided permanent impairment ratings.

It cannot be said that claimant refused to cooperate with medical treatment based upon the facts in this case. Although he did miss the first scheduled appointment, he was unaware that a second appointment had been scheduled. Thereafter, he was simply sent to doctors to obtain disability ratings.

Both doctors determined claimant's work-related accident caused permanent functional impairment. Both doctors provided claimant with permanent impairment ratings but the ALJ noted that neither doctor was provided an accurate description of claimant's employment activity after he left his job with respondent.

² K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

³ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

⁴ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

As previously noted, Drs. Murati and Munhall provided claimant with permanent ratings for injuries claimant suffered working for respondent. The ratings were provided by Dr. Murati in July 2005 and by Dr. Munhall in October 2005. Consequently, claimant had been provided a permanent impairment rating from Dr. Murati either before or within a month of claimant beginning his work washing cars in California. Consequently, it appears that claimant's car washing job did not materially affect Dr. Murati's rating. Conversely, claimant had worked washing cars for a longer period of time before he was examined and rated by Dr. Munhall. And Dr. Munhall diagnosed more pervasive chest complaints and additional rib complaints that had not been made to or noted by Dr. Murati. Thus, it is more problematic to determine whether the California job had increased claimant's complaints and affected Dr. Munhall's ratings. Consequently, the Board finds the opinion of Dr. Murati more persuasive and determines claimant has met his burden of proof to establish that he suffered a 3 percent permanent partial impairment of function to his right shoulder.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 17, 2008, is modified to reflect claimant suffered a 3 percent permanent partial scheduled disability to his right shoulder.

Claimant is entitled to 6.75 weeks of permanent partial disability compensation, at the rate of \$363.08 per week, in the amount of \$2,450.79 for a 3 percent loss of use of the right shoulder, making a total award of \$2,450.79.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Peter J. Antosh, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge